United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-1008

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,
Appellant,

-against-

FRANK ALTESE, etc., EUGENE SCAFIDI, et al.,
Appellees.

On Appeal from the United States District Court
For the Eastern District of New York

BRIEF FOR APPELLEE EUGENE SCAFIDI

ARNOLD E. WALLACH
Attorney for Appellee Scafidi
11 Park Place
New York, N.Y. 10007
(212) 227-0959

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

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CASE CITED

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- against -

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STATEMENT:

The appellee Eugene Scafidi with twenty (20) other defendants were charged by a grand jury of the Eastern District of New York in an indictment alleging eight (8) counts. Specifically Scafidi was charged in counts 1 and 2 (among others) charging the defendants with a violation of 18 U.S.C. 1962 (c), 1963 and 2 which is found in Chapter 96 of the U.S. Code dealing with "Racketeer Influenced and Corrupt Organization"; Section 1962 relates to the prohibited activities; Section 1963 prescribes the penalties for violating the aforementioned statutes while Section 1962(d) makes it a crime to commit the specific conspiracy prohibited in that section.

Additionally, counts 3, 4 and 8 name the appellee Eugene Scafidi and others with a violation of 18 U.S.C. 1955 and 2, alleging that the accused was connected with a gambling business

as defined in Section 1955. Count 8 charged the appellee Eugene Scafidi and others under the General Conspiracy Statute found in 18 U.S.C. 371 (2-6)*.

Chief Judge Mishler of the United States District Court, Eastern District of New York dismissed counts 1 and 2 founded on 18 U.S.C. 1962 (c) and (d) and 1963 (19-23). The basis of Chief Judge Mishler's decision was that Section 1962 dealt with the infiltration of a legitimate business by the persons engaged in the racketeering activities defined in 18 U.S.C. 1961.

STATEMENT OF THE CASE:

Count 1 of the indictment was framed under 18 U.S.C. 1962(c) and alleged that the defendants maintained an enterprise defined in 18 U.S.C. 1961 (4) and which affected interstate commerce; the balance of the count then charged that an illegal gambling business prohibited under 18 U.S.C. 1955 was maintained and alleged that the appellee Eugene Scafidi was associated with such gambling business through a pattern of racketeering activity. The racketeering activity was described as illegal gambling prohibited by Section 225.20 of the Penal Law of the State of New York.

Count 2 charged a special conspiracy under 18 U.S.C. 1962(d) having for its purpose a violation of 18 U.S.C. 1962 (1) and 1963

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*( )This refers to the pagination of the appendix furnished by the appellant.

and alleged various gambling activities describing the appellee's role in relation thereto. The date alleged in counts 1 and 2 was February 26, 1971 to the date of the filing of the indictment (1, 2, 3).

The dates alleged in regard to the other counts involving the appellee are as follows:

Count 3 - March 1972 to July 1972

Count 4 - December 13, 1972 to March 9, 1973

Count 8 - February 26, 1971 to the date of the filing of the indictment.

POINT I:

18 U.S.C. 1962(c) RELATES TO AN ILLEGITIMATE USE OF A LEGITIMATE ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITIES OR COLLECTION OF AN UNLAWFUL DEBT AND THE GAMBLING ACTIVITIES ASCRIBED TO THE APPELLEE WAS NOT THE "ENTERPRISE" AS USED IN THE STATUTE.

18 U.S.C. 1961(4) defines the word "enterprise". The statute catalogs the various enterprises and then includes the phrase "other legal entity" and concludes by referring to the fact that enterprise also includes individuals "associated in fact" although not comprising a"legal entity".

It is put that the reach of the statute broadly reaches an association although not an association which may be one de facto

rather than legally formed, e.g. a partnership or a corporation or a union which may be a De Facto association although not De Jure because it may not be recognized in law. The non-recognition may be ascribed not to its criminal nature but merely because of the technicalities of the laws governing associations, corporations, partnerships, unions and the like. Thus an individual employing an agent would be an association in fact. Put another way, it is suggested that legal entity does mean an entity which is dedicated to crime or the prohibited activities. While the legislative history is amply pursued in Chief Judge Mishler's decision and there will be no useful purpose in restating it, reference should be made to Section 1962 subdivisions (a) and (b).

A brief reference however to the legislative history it is believed would be helpful. The U.S. Code Congressional and Administrative News,91st Congress, Second Session, 1970, page 4010 states that Title IX was a new chapter in Title 18 and contained three (3) standards. Standard 3 was described as prohibiting "the operation of any enterprise engaged in interstate commerce through a pattern or racketeering activity" (internal quotations omitted). On page 4032 it is stated that subdivision (4) of 1961 states that an enterprise included associations in fact as well as legally recognized associate of entities. It then states:

"Thus, infiltration of any association group by any individual or group holding a property interest can be reached."

This clearly evidences the legislative intent that a person accused of violating 18 U.S.C. 1962 could not avoid liability by a technicality claiming that the association is not De Jure. There is not one expression in that explanation that "enterprise" includes and extends to an illegitimate association even though it may fall outside the traditional concepts of corporations, partnerships or unions. It would seem that "enterprise" relates to an association of persons who merely have a property interest. It is suggested that the meaning is that an offender who illegally acquires an interest in an enterprise cannot block the statute by claiming that the enterprise was not recognized in law as a legally formed association.

Whatever value reference to legislative debates and comments are, in interpreting legislation, equally valuable are the comments of the proponents of the legislation in question especially when the proponents include an official of the Department of Justice and the United States Senator who took an active role in the sponsorship of such legislation. A clear exposition of the legislation in question is found in Notre Dame Lawyer, Fall 1970, Volume 46, at page 41, et seq. In this writing, Will Wilson, a then official of the Department of Justice on page 51 states in part that:

> "Title IX makes a similar determination of special conduct deserving special federal prohibition. The prohibition here is directed against investment in legitimate business of capital accumulated by a pattern of racketeering activity. ...The justification for special treatment of such activity is widely recognized..."

The author then adopts a comment by the Anti-Trust Section of the American Bar Association and quotes that comment as follows in part:

> "...When organized crime moves into a business, it customarily brings all the techniques of violence and intimidation which it used in its illegal business. The effect of competitive or monopoly power attained this way is even more unwholesome than other monopolies because its position does not rest on economic superiority."

Then on pages 51 and 52 the author shows how people engaged in illegitimate pursuits and having **amassed** capital therefrom, can take over a legitimate business and apply their criminality to the maintenance of such business, **which enterprise is otherwise legal.**

It is respectfully submitted that th is the truly underlying subdivision (c) of 18 U.S.C. 1962.

The comments of Will Wilson were followed by an article in the Notre Dame Lawyer, Fall 1970, Volume 56 at page 55 et seq. The author of that article was Senator John L. McClellan. Pages 140, et seq. are devoted by the author in regard to Title IX. On page 141 it is stated in part that:

> "Title IX is aimed at removing organized crime from our legitimate organizations. Experience has shown that it is insufficient merely to remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and where possible forfeiture of their ill-gotten gains."

Senator McClellan further wrote on pages 142 and 143 in Notre Dame Lawyer, supra, that the offenses described in the statute were of a nature that they were of "organized commercial exploitation" and concludes by stating that:

> "...That is all that Title IX listed offenses purports to be, that is all the Senate Report claims it to be, and that is all it should be."

In other words, it is clear that the meaning of the legislation in issue is that legitimate business was to be insulated from infiltration. It was further written on page 144 of that article, that it is not an impossible burden to trace "tainted funds". It is clear that this legislation did not seek to multiply the punishment of the offenders who may violate 18 U.S.C. 1955 or 18 U.S.C. 1952. Thus 18 U.S.C. 1952 carries a maximum penalty of a fine of $10,000 or five (5) years imprisonment or both. 18 U.S.C. 1955 (a) provides a penalty for a violation of a fine of $20,000 maximum of a jail term of five (5) years, or both. 18 U.S.C. 1963 provides that a violation of Section 1962 carries with it a fine of not more than $25,000 or imprisonment of not more than 20 years, or both, plus forfeiture provisions.

We think that the range of statutes involved in this case should be appraised in the same manner that the United States Supreme Court adopted in Milanovich v. U.S., 365 U.S. 551, (1961). There at issue, was 18 U.S.C. 641 which penalized thieves and also receivers of stolen property. That issue was whether the thief could be a receiver under the statute. The United States Supreme Court abandoned the conceptual view of the different capacities of the offenders, and held that the issue was one of statutory construction. It accordingly held that Congress wrote the statute to reach a new group of criminals not to increase the punishment or offenses of one group. In other words, the aim of the statute was not to increase the penalties of a thief but to reach the receiver of stolen property.

We think that the same rule of construction applies to the issue before this Court.

It would seem that the appellant's argument on page 34 that the taking over of a gambling business by the offenders described in 18 U.S.C. 1961 and 1962 is also a violation of 1962 (c) is not logical. The appellant argues that the gambling business taken over comes under 18 U.S.C. 1962(c) because there is an added element, namely that the gambling business affects interstate commerce. But 18 U.S.C. 1955 is founded on a Congressional presumption or irrebutable finding that the activities and persons described in 1955 can be reached because interstate commerce will be or has been affected. Why Congress should then add the

element that there be proof of the affecting of interstate commerce in Section 1962 remains a mystery. All Congress had to do was to increase the penalties for violating 18 U.S.C. 1955. It is obvious that the reach of Section 1962 is based on the requirement that interstate commerce be affected because of the fact that the"enterprise" within the meaning of that statute is a legitimate enterprise.

POINT II:

THE APPELLEE JOINS IN ALL THE OTHER ISSUES RAISED BY COUNSEL FOR THE OTHER APPELLEES:

CONCLUSION:

THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Eugene Scafidi

WALLACH US v. Scafidi

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 19 day of March 1976 deponent served the within Appellee Brief upon:

U.S. Atty. Eastern District of NY

attorney(s) for

Appellant

in this action, at

225 Cadman Plaza E., Brooklyn, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 19
day of March 1976.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976